IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-570

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, International Longshoremen's Association, AFL-CIO ("ILA"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The majority and dissenting opinions of the Court of Appeals, rendered on June 29, 1976, are not yet officially reported. They appear at pages A.79-A.96 of the Joint Appendix ("A.") hereto.[1] The Court's orders denying

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[1] These and the following referenced opinions, being voluminous, are reprinted in a separately bound Joint Appendix to the Petitions of ILA and the New York Shipping Association, Inc. ("NYSA"), concurrently filed with the Court. It is submitted simultaneously herewith.

a Joint Petition for Rehearing with Suggestion for Rehearing *En Banc* were entered on August 6, 1976, and appear at pages A.97-A.98 of the Joint Appendix. The underlying decision and order of the National Labor Relations Board ("Board"), issued on December 4, 1975, is reported at 221 NLRB No. 144 and appears at pages A.58-A.78 of the Joint Appendix. The Board's Administrative Law Judge's Opinion and Recommended Order, dated December 9, 1974, also reported at 221 NLRB No. 144, appear at pages A.1-A.57 of the Joint Appendix.

Jurisdiction

The judgment of the Court of Appeals, appearing at pages A.99-A.101 of the Joint Appendix, was entered on September 9, 1976. This Petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the national labor policy on work preservation, found by this Court in *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 (1967), was violated by the decision below when it erroneously focused on the work of off-pier consolidators, rather than on the historical work of pierside longshoremen, in deciding whether the longshoremen's representatives, in collectively bargaining with longshore employers, pursued a valid objective not precluded by the Act?

2. Whether the objective of the longshoremen in seeking to perform traditional unit work at shipside piers and terminals—their exclusive loci of work—was primary activity within the purview of the Act and does the contrary holding below, therefore, conflict with all other Circuit Court decisions on work preservation?

Statutory Provisions Involved

Sections 8(b) (4) and 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(b) and (e), in pertinent parts provide:

(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

• • •

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products or any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

• • • • •

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any con-

tract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:

Statement of the Case

Petitioner ILA is a labor organization which represents longshoremen on the East, South Atlantic and Gulf Coasts of the United States. NYSA is an incorporated association of employer-members who are engaged in the business of shipping general cargo between New York and other ports and is authorized to negotiate and enter into collective bargaining agreements on behalf of its members.

Traditionally, the handling of solid cargoes moving across the ports of the East and Gulf Coasts of the United States, including the docks of New York, has been done by longshoremen.[2] Beginning in World War II, a

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[2] The Board's certification of the longshore unit in the Port of New York involved herein bears out the broad spectrum of dockside work. It is defined in *Matter of New York Shipping Association,* 116 NLRB 1183 (1956) at 1188, as:

> "All longshore employees engaged *in work pertaining to the* rigging of ships, coaling of same, *loading and unloading of cargoes* including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships including hatch bosses, cargo repairmen, checkers, clerks and timekeepers, and their assistants, including head receiving and delivery clerks; general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers and marine carpenters, in the Port of Greater New York and vicinity. . . ." (emphasis added)

technique known as "containerization" was introduced. At inland sites, cargoes were packed (a/k/a "stuffed") into containers of ever-larger dimensions, which were then transported to the docks and loaded onto the ships specially constructed to carry them. From the outset, ILA recognized this innovation as a threat to the work opportunities of its members and strongly resisted its increasing use. Conversely, the employer shipping companies welcomed containerization as a labor and cost-saving device.[3]

A compromise solution was reached and incorporated into the 1959 contract between ILA and NYSA whereby carriers' containers, stuffed with merchandise from a single shipper and loaded by its employees at its own factory or warehouse (known as "full-shipper-load" containers), would pass over the piers without rehandling by longshoremen. In return, ILA's members received payment of a modest royalty in recognition of ILA's forbearance from handling such containers and of lost job opportunities. All of the carriers' other containers into which miscellaneous cargo emanating from more than one shipper were consolidated (variously known as "consolidated," "LTL" and "LCL" containers) would continue to be stuffed or unloaded (a/k/a "stripped") from containers at the piers

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[3] "Labor productivity is astonishingly increased by containerization. One major shipping company reported that each of its work gangs on a conventional ship produced an average of 15 tons per hour compared with 300 tons an hour worked by one gang at a container ship hatch. More generally, the industry considers that 'it would take 126 men 84 hours each, or a total of 10,584 man-hours, to discharge and load about 11,000 tons of cargo aboard a conventional ship. The same amount of cargo on a container vessel can be handled by 42 men working 13 hours each or a total of 546 man-hours. These savings, it should be noted, come about because of a reduction in man-hours—a fact of menacing importance when we turn to collective bargaining on the issue'." Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, Labor L.J., July, 1970, 397-419 at 400.

and docks. No royalties have ever been demanded or paid on consolidated containers.[4]

The ensuing ten years were marked by numerous arbitrations, grievances and work stoppages based upon ILA's complaints that carrier-members of NYSA were permitting their owned or leased containers to be stuffed or stripped at off-pier locations by other than their own (i.e. longshore) employees—all in violation of the 1959, 1962 and 1964 industry Agreements.

By 1968, containerization was flourishing and was on the verge of even greater expansion. It had grown to the point that longshoremen had lost so many jobs and income that at ILA's 1968 Convention the union's members directed their leaders to demand serious restrictions of the technique in the upcoming negotiations. Management was diametrically opposed. The parties were unable to reach agreement in the ensuing negotiations.

A Presidential Board of Inquiry, convened pursuant to Section 206 *et seq.* of the Act, 29 USC § 176 *et seq.* (*National Emergencies*), recognized and reported that there were two key, related issues of which containerization was "the most urgent item" and the "overriding issue" dividing the parties. An eighty-day "Taft-Hartley" injunction was issued and expired in December, 1968. A *57-day strike* followed in its wake.

The President of the United States intervened and appointed David Cole, a highly respected labor mediator, to bring the parties together. At the exhortation and persistence of the Presidential Mediator, the parties came

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[4] The ILA-NYSA Agreements at that time set the standards for similar agreements in ports from Maine to Hampton Roads, Virginia. In 1971 the major ports, consisting of Providence, Boston, New York, Philadelphia, Baltimore and Hampton Roads, aligned themselves into a single, overall employer bargaining unit, the Council of North Atlantic Shipping Associations ("CONASA"). (A.3)

to terms in early 1969 under which ILA agreed to continue to permit full-shipper loads—which presently constitute 80% of all container movements—to move without restriction. In return, the union insisted upon inclusion in the Agreement proper of a comprehensive codification of the longshoremen's rights to stuff and strip consolidated containers. This portion of the Agreement, subsequently included in all ILA contracts from Maine to Texas, was entitled "Rules on Containers" ("the Rules") and was specifically ". . . intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts at deepsea piers or terminals." (A.19-A.21)

The Rules provide for stuffing and stripping by longshore labor of all "[c]ontainers owned or leased by employer-members . . . which contain LTL or consolidated full container loads." Carrier members of NYSA who did not live up to this aspect of their agreement were subject to assessments of liquidated damages of $250 (later $1,000) *per* container *not* stuffed or stripped.

In the following year (1970), the Rules, as codified, were tested under the scrutiny of the Second Circuit Court of Appeals in *Intercontinental Container Transport Corp.* v. *New York Shipping Association and International Longshoremen's Association,* 426 F.2d 884 (2d Cir., 1970) (hereinafter "ICTC"). The Court unanimously found that the Rules were in ILA's pursuit of a valid work preservation objective. In arriving at its determination, the Court recognized the work jurisdiction of the longshoremen as a distinct, pierside unit, *id.* at 889. See Concurring Opinion of Judge Anderson, *id.* at 889-891.

Having arrived after bitter strife at a compromise agreement sanctioned by the Presidential Mediator and the judiciary, ILA turned its attention in later negotiations to insuring that the Rules were carried out. These activities necessarily were directed toward NYSA's members. ILA never sought to organize, displace or replace employees

of the consolidators, nor has it ever addressed its protests and grievances to the consolidators. (A.41) Experience showed that frequent violations of the Rules occurred, often with the acquiescence or connivance of the major container carriers in the New York-Puerto Rican trade. The record is well-documented with protests by the union.

ILA came to the inescapable conclusion that the then-existing enforcement merely treated the "symptoms", but that the "source" of the problem was the NYSA member-carriers furnishing their own containers, the disposition over which they had complete control, to off-pier facilities of consolidators *beyond* the work jurisdiction of their own unit longshoremen. In this context, the parties met in January, 1973 and entered into a Supplemental Agreement, known as the "Dublin Rules". They were designed to put teeth in the Rules on Containers so as to minimize the impact of containerization on the loading and unloading of maritime cargo historically performed at the piers by longshoremen.

These interpretive Rules provided, *inter alia,* at ILA's insistence, that no ILA longshore employer shall supply its containers to *any* off-pier facilities, away from the locus of employment of the longshore unit, including not only those of consolidators and distributors *but also* of ILA's own employers, members of NYSA. (A.22-A.23)

Consolidated Express, Inc. ("Consolidated") and Twin Express, Inc. ("Twin") are off-pier consolidators engaged in the business of consolidating shipments from various consignors into containers, owned or leased by NYSA carriers, for delivery to the docks for loading onto the carriers' ships. In June, 1973, Consolidated, and thereafter Twin, filed unfair labor practices with the Board, alleging that the "secondary boycott" and "hot cargo" provisions of the Act made the Dublin Rules illegal. Preliminary injunctions were obtained by the Board respecting both Charging Parties. The two cases were consol-

idated for hearing in 1974 and were referred to an Administrative Law Judge, the Honorable Arnold Ordman, a former General Counsel of the Board.

Judge Ordman gave careful consideration to the evidence in the light of each of the "surrounding circumstances" set forth in *National Woodwork Manufacturers Association* v. *NLRB,* 386 US 612 (1967), *viz.,* "the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry." 386 US at 645, n.38. (A.39-A.42) He recommended dismissal on the basis that the "work in controversy" (i.e., the handling of break-bulk, multi-shipper cargoes, of the types that are stuffed by consolidators into consolidated containers) traditionally had been performed by ILA members, so that the challenged portion of the Agreement between their union and employers falls under the doctrine of "work preservation" which this Court, in *National Woodwork,* recognized as not coming within the prohibitions of the Act. *ILA and Consolidated Express, Inc. etc.,* JD-754-74 (Dec. 9, 1974, Ordman, J.).

The Board refused to accept Judge Ordman's recommendation. *ILA and Consolidated Express, Inc., etc.,* 221 NLRB No. 144 (Dec. 4, 1975). It concluded that the on-pier stripping and stuffing work performed by longshoremen as an "incident of loading and unloading ships, does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises". Though aware of the longshore unit's work history, the Board confined its consideration to the period—and work—of stuffing and stripping modern containers. The Board issued a broad Order which eviscerated the CONASA-ILA Master Agreement. It prohibited ILA and NYSA from, *inter alia,* forever maintaining in effect or in any manner or by any means enforcing the operable provisions of the Rules on Containers, as interpreted by the Dublin Supplement, "or

any other contract or agreement, express or implied", affecting not only Consolidated and Twin—who together handle less than 2% of the 200,000 consolidated containers passing thru the port each year—but "any other person" as well.

ILA and NYSA immediately requested the Second Circuit to review the Board's Order. The majority of the three-member panel granted the Board's Cross Application for Enforcement of its Order. (A.91) The majority quoted and adopted the Board's view that the off-pier work, generated by containerization, is determinative of the issue. It was not impressed by—and did not consider—various other findings of the Board, which are not at issue herein. (A.92)

Judge Feinberg, dissenting, opined that the Board's decision "rests upon a fundamental error". (A.92) Quoting Administrative Law Judge Ordman and referring to the precise work which the Supreme Court found that the carpenters were preserving in *National Woodwork,* he defined the work here being preserved as that which "the ILA members used to do on the pier *before* containerization moved most of it off the pier" and commented that "[t]he Board cannot be permitted to frustrate [our present national labor] policy in the guise of making factual findings." (A.94-A.95)

A joint ILA-NYSA Petition for Rehearing With Suggestion for Rehearing *En Banc* thereafter was denied. (A.97-A.98)[5]

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[5] Consolidated, Twin and Local 807, Teamsters (representing Consolidated's employees) were permitted to intervene in the appellate proceeding. Pursuant to Rule 21(6) of the Court, they are being furnished copies of this Petition.

REASONS FOR GRANTING THE WRIT

1. The decision below subverts this Court's holding in *National Woodwork.*

All the tribunals below agree that this case represents an application of the "work preservation doctrine" enunciated by this Court in 1967 in *National Woodwork.* The Administrative Law Judge and Judge Feinberg, dissenting in the Court of Appeals, found the cases indistinguishable. (A.38, A.94)

National Woodwork recognized that just as employers must not be denied the benefits of technology, labor commensurately had a legitimate interest in protecting the historic domain of its members; and that the resolution of these mutually exclusive interests was best left to the collective bargaining table. *Fiberboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203, 225 (1964); *National Woodwork, supra,* 386 U.S. at 640, 642. In the context of that decision, innumerable collective bargaining agreements have been reached throughout the nation, including the resolution of the bitter 10-years of strife over the effects of innovation in the shipping industry, which culminated in the Rules on Containers.

The identity between the situations in *National Woodwork, supra, Houston Insulation Contractors Association* v. *NLRB,* 386 U.S. 664 (1967) and the instant case should be evident when one considers the contending forces, even without the intervening history of concessions, nibbling away and violations which have marked the shipping industry. The appearance at a job site of prefabricated doors entailed the elimination of work traditionally performed by carpenters. The appearance at dockside of preloaded, consolidated containers entailed the elimination of work traditionally performed by longshoremen in the handling of break-bulk cargo. This Court held in *National*

Woodwork and *Houston Insulation* that activities by the carpenters and asbestos workers to prevent such elimination—i.e., to preserve their work—*did not* violate the Act, even though this *necessarily* would curtail or eliminate the work performed at the fabricators' off-job-site plants. So too, activities by the ILA to prevent the elimination of its members' historical work equally are legal despite their incidental effects on some of the work at the consolidators' facilities.

Implicit in the concept of preservation is the idea of something which existed before and is now threatened. If the standard is to be the work *engendered* by technological innovation, rather than the work *threatened* by such innovation, then the work that has arisen as an off-shoot of the innovation is protected, whereas the historical work of the grieving employees obviously is not preserved. But this is the very result rejected by *National Woodwork* when it declared that

> ". . . the *touchstone* is whether the agreement or its maintenance is addressed to the labor relations *of the contracting employer vis-a-vis his own employees . . .*" 386 U.S. 612, 645. (Emphasis added)

We respectfully refer the Court to Judge Feinberg's ineluctable reasoning in his discussion of the underlying principle and its application herein. (A.92-A.96)

We respectfully submit that this Court should grant Certiorari to preserve the integrity of its own rulings; to correct the deviation therefrom by the Court below; and to prevent further deviations by the Courts and the federal agency which adminsiters this increasingly significant area of the Act in patently recurring situations. Otherwise, the decision below effectively opens the door to undermining, frustrating and eroding the Congressional intent delineated in *National Woodwork* as the national labor policy.

2. The decision below conflicts with all other Courts of Appeals in applying the principle of *National Woodwork*.

A consistent line of cases in the Courts of Appeals for the District of Columbia Circuit, the Sixth Circuit and the Eighth Circuit has followed the criteria of *National Woodwork*. Though their context and language may have differed, each Court invariably looked to the work of the protesting employees as *the key* to whether these employees were brandishing their "swords" to acquire new work, or were raising their defensive "shields" in asserting or re-asserting their recognized rights to perform historical unit work.

Thus, the D. C. Circuit inquired into whether the work was "fairly claimable". *Meat and Highway Drivers, etc.* v. *NLRB*, 335 F.2d 709 (D.C. Cir., 1964); *Local Union No. 636, Plumbers* v. *NLRB*, 430 F.2d 906 (D.C. Cir., 1970); *Local 742, Carpenters* v. *NLRB*, 444 F.2d 895 (D.C. Cir., 1971), *cert. denied sub nom J. L. Simmons Co.* v. *Local 742, Carpenters*, 404 U.S. 986 (1971); *Sheet Metal Workers Int'l Ass'n, Local Union No. 223* v. *NLRB*, 498 F.2d 687 (D. C. Cir., 1974).

The Sixth Circuit looked to whether the work involved was "customary work function" performed by the respondent union's members. *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907 (6th Cir., 1970), *affirming Retail Store Employees Local 876*, 174 NLRB 424 (1969).

The Eighth Circuit decided whether the work was being "recaptured". *American Boiler Manufacturers Ass'n.* v. *NLRB*, 404 F.2d 547 (8th Cir., 1968), *cert. denied*, 398 U.S. 960 (1970), *affirming United Association of Pipefitters, Local 455*, 167 NLRB 602 (1967). In *American Boilers* the Court found a valid work preservation objective even after a hiatus of 23 years during which off-site prefabricated materials were brought on-site for installation.

Each of the other Circuits, then, has looked to the work threatened by technological innovation rather than to the jobs created by it. By its misinterpretation, the Second Circuit has placed itself in conflict with all of these Circuit Courts. As a result, this Petitioner and its members have been denied equal protection and application of the law.

The decision below is more than just an isolated error. It is having—and will continue to have—a rippling effect.[6] The confrontations in the application of *National Woodwork* will proliferate with the forward movement of the Board's present and prospective coast-wide litigation against ILA and the Rules.[7]

This Court should accept the case at bar to clarify the doctrine it has previously established as a nation-wide standard, especially in view of the critical reliance which employees and employers in this and in all industries under

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[6] The Board and its Administrative Law Judges already have construed its underlying ruling as a pivotal precedent in finding violations by the ILA and its affiliated councils and locals in other CONASA ports, even in an instance when the Rules, *per se*, were not involved. *ILA and Associated Transport, Inc., et al.*, JD-540-76 (Aug. 19, 1976, Wagman, J.); *ILA et al. (The Chesapeake and Ohio Railway Company)*, 225 NLRB No. 108 (Aug. 31, 1976).

[7] The conflict is crystallized in two appeals now pending before the Fourth Circuit Court of Appeals, in which the Board sought § 10(l) injunctions in Baltimore and Hampton Roads, predicated on the same Rules on Containers and sections of The Act herein and which involve almost identical facts and parties. *Humphrey* v. *ILA, et al.* (Docket Nos. 75-2281, 76-1729, 76-1730). In one, the District Court, citing *National Woodwork* and *American Boilers, supra* found no reasonable cause to issue Complaint and denied the Board's Petition. *Humphrey* v. *ILA et al.*, 401 F.Supp. 1401 (E.D. Va., 1975, Merhige, J.). In the other, the District Court issued an injunction. *Humphrey* v. *ILA, et al.* Civil No. Y-75-1395 (D.C. Md., 1976, Young, J.). The Board brought the Decision of the Second Circuit to the Fourth Circuit's attention, ostensibly as persuasive authority.

the jurisdiction of the Board and of the Court below attach to their determinations. There are, therefore, compelling reasons why this Court should grant Certiorari to now resolve the conflict between the Courts of Appeals which is reflected even within the Board's own contrary rulings.[8] *Avco Corp.* v. *Aero Lodge 735,* 390 U.S. 557, 559 (1968); *Northeastern Pennsylvania National Bank* v. *U.S.,* 387 U.S 213, 217 (1967).

3. The decision below is inconsistent with the Second Circuit's own holdings respecting the same industry and work unit involved herein. The Court should exercise its supervisory jurisdiction to maintain consistency in an important forum and industry.

The decision below presents an intra-Court conflict, binding on its District Courts, where the same issue is an important and recurring problem. On two separate occasions the Second Circuit has considered the work of the longshoremen and each time came to a contrary conclusion.

In the first, *ICTC, supra,* the issue was whether the same Rules challenged herein were entitled to the labor exemption from the anti-trust laws. *ICTC,* like Consolidated and Twin, was an off-pier consolidator of maritime cargo. Coincidentally, *ICTC's* employees were members of the ILA, though they were employed outside the scope and locus of the certified longshore unit. The Court held that the ILA, acting solely "in its self-interest", forced NYSA's

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[8] See, e.g., *National Woodwork Manufacturers Association,* 149 NLRB 646 (1964); *Houston Insulation Contractors Association,* 148 NLRB 866 (1964); *United Association of Pipefitters, Local 455 (American Boiler Manufacturers Ass'n),* 167 NLRB 602 (1967); *Retail Clerks Local 648 (Brentwood Markets, Inc.),* 171 NLRB 1218 (1968); *Retail Store Employees Local 876,* 174 NLRB 424 (1969).

reluctant employers to yield to its demand that longshore unit employees retain the work specified in the Rules. The Court, applying such authorities as *National Woodwork, supra, Fiberboard, supra* and *Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 US 676 (1965), concluded that the 1968 Rules, *per se,* were the product of arms-length collective bargaining and therefore fell within the labor exemption, stating that

> "[t]he provisions of the collective agreement have as their object the preservation of work traditionally performed by longshoremen covered by the agreement." 426 F. 2d at 887.

Since case law development in the anti-trust area was the foundation for this Court's approval of the work preservation exemption in *National Woodwork,* an Agreement whose object does not violate the anti-trust laws would similarly not violate Sections 8(b)(4) and (e) of the Act herein. 386 U.S. at 653-657.

The majority of the panel below did not overrule, nor did it distinguish, the law of the case in *ICTC.* Rather, it attempted to distinguish *ICTC* on a procedural technicality which, we submit, was not well taken.[9]

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[9] ICTC initially brought an action in the District Court, S.D.N.Y., which was dismissed when it brought a concurrent unfair labor practice charge against ILA and NYSA, similarly predicated on Section 8(e) violations. The charge was dismissed by the Regional Director and the Board's General Counsel sustained the dismissal. The Court of Appeals, alluding to what had occurred, stated that where an action is predicated on a claim falling within the ambit of Section 8 of the Act, the District Court must defer to the Board on the ground of preemption under the Act and the action must be dismissed. The Court expressly declared that such a ruling is "clearly *not determinative* in an action based on different allegations and seeking a different remedy," 426 F.2d at 887 (emphasis added), e.g., a Section 303 action, a Taft-Hartley injunction or enforcement of a Board order. The majority surprisingly took this to mean that the holding of *ICTC* would not be binding or even persuasive in reviewing *the merits* of a Board decision. Maj. Op., n. 1. (A.82)

Although *ICTC* arose before the "Dublin Rules", the issue is identical inasmuch as Dublin represents only an attempt to enforce and to achieve the same ends as the Rules on Containers which were the subject of the earlier case. If the object of the Rules on Containers was validly work-preservative, that same object of the Dublin Rules equally is so.

In the second case, *Pittston Stevedoring Corp.* v. *Dellaventura et seq.*, Docket Nos. 76-4009, 76-4042, 76-4043 and 75-4249 (2d Cir., July 1, 1976), the Second Circuit, interpreting the Longshoremen's and Harborworkers' Compensation Act of 1972, held that a longshoreman is entitled to benefits under that Act for any injury in connection with the movement of containers, since those containers are the functional equivalent of the longshoremen's traditional work.[10] Under the decision below, the *same* longshoreman is not entitled to have his union bargain with his employer to preserve his rights to load and unload *those same containers,* because, it is stated, this is the traditional work of the consolidators' employees.

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[10] The panel in *Pittston* cited *ICTC* as precedential authority. It recognized that modern cargo handling methods, such as containerization, have brought about

> "new facts of life on the waterfront, which as this Court noted in [ICTC] means that a good deal more of the longshoreman's traditional jobs are now performed on shore. Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds." (A.136)

Indeed, in *Leathers Best Inc.* v. *SS Mormaclynx*, 451 F.2d 800 (2nd Cir., 1971), that Court recognized that a container is "functionally a part of the ship." This has been a contention of ILA from the very inception of containerization.

In view of this Court's supervisory function over the orderly administration of courts within the federal system, particularly in a circuit where the activities of the shipping industry and other key industries of national importance are concentrated and wherein the issues involved directly or indirectly inevitably will continue to recur, Certiorari should be granted to clarify this situation. Inasmuch as the Court of Appeals has not seized the opportunity of our suggestion for rehearing *en banc* to give authoritive, consistent application to its own decisions, and in the absence of any change in the Congress' declaration of national labor policy, this Honorable Court perforce is the forum of last resort. See *National Woodwork,* 386 US 612 at 641-645; *NLRB* v. *The Insurance Agents International Union,* 361 US 477, 500 (1960).

4. The decision below creates an inherently inequitable situation with grave, open-ended consequences. The public interest is vitally affected.

The Order below will have enormous economic consequences for a vital national industry employing in excess of 100,000 employees, not only in New York but in all ports of the North Atlantic, the South Atlantic and Gulf Coasts which have been affected by the "container revolution". The Board's Order can be read as permitting complete freedom in the use of containers, not only in the Puerto Rican trade and the Port of New York, the arenas of the present litigation, but also in all other trades and ports from Maine to Texas.

The Order penalizes the ILA for flexibility and accommodation to progress, involving 80% of containerized cargo moving through a major port. Despite the fact that the tonnage of cargo in New York has progressively increased since 1959, there has been an approximate *sixty percent (60%) reduction* (i.e., 31,500 to less than 13,000 employees) in longshore and related crafts at the piers in that relatively short, 17-year span. It is reliably estimated that

3,000 employees in longshore and related crafts are directly or indirectly engaged in the consolidation and deconsolidation of cargo at the piers, from the tailgate of the delivery trucks to stowage aboard ocean-borne vessels and *vice-versa*.

The right of longshoremen to perform the work of stuffing and stripping consolidated containers was finally codified after years of lengthy strikes, work stoppages, grievances and arbitrations. In each instance, the public at large, which is so obviously dependent on the uninterrupted flow of maritime commerce, was inconvenienced. Untold millions of dollars in losses were sustained, both within the industry and by those firms inland whom it services. The Rules were finally spelled out and enforced in response to the urging of the President in 1968 and the active participation of his personal representatives in 1964 and 1968.[11]

The instability and imbalance of labor relations created by the decision below portends even more seriously destructive effects at this late date than in 1968. The vast, accelerated growth of containerization and commensurate inroads upon longshore jobs, in the relative calm of the successive ILA Agreements during the intervening eight

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[11] We respectfully request the Court to take Judicial Notice that on July 1, 1964, Secretary of Labor Wirtz issued a comprehensive report on "Manpower Utilization and Job Security in the Longshore Industry in the Port of New York." In his transmittal letter to ILA's and NYSA's chairmen, which is reproduced in an addendum hereto, he stated that

> ". . . while management must be permitted to introduce new technology and economies and improve manpower utilization, there is an accompanying obligation upon the industry to assure a direct measure of job security for its workforce and to protect adequately any disadvantaged employees.
>
> ". . . I must impress upon you the importance of finding an answer to the problems which face your industry through the processes of normal collective bargaining. The longshore industry plays too vital a role in the industry and commerce of our Nation to risk any alternative route."

years, necessarily leads to this conclusion. The predictable affects upon the public that directly and indirectly is serviced by this industry may reasonably be estimated in the mirror of prior such experiences.

5. The case at bar has serious national implications for labor relations and industrial progress.

This Court already has recognized that:

> "In this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability." *Fiberboard, supra,* 379 US at 205.

In *National Woodwork, supra,* the Court reiterated its foregoing comment, and said:

> "• • • Congress, in enacting Section 8(e), had no thought or prohibiting agreements directed to work preservation . . . . We cannot lightly impute to Congress an intent in Section 8(e) to preclude labor-management agreements to ease these effects through collective bargaining on this most vital problem created by advanced technology." 386 U.S. 612 at 640,

The work preservation doctrine was not for the benefit of the ILA alone. It affects all organized labor. By clarifying that doctrine in *National Woodwork,* this court gave impetus to the resolution of competing interests of employers and employees through collective bargaining fostered by the Act. 29 USC § 151 (*Findings and Declaration of Policy*). (See Addendum.) Any whittling-away of that doctrine by the application of the inverted standard employed by the Second Circuit assuredly will have a chilling effect on all labor relations throughout the nation. For if the rationale of the Board's decision is so sanctioned, a

labor union most certainly would have to take an inflexible position against any type of technological change.

A case presently before this Court demonstrates the basic, far-reaching importance of the issues in the decision below. This Court granted Certiorari in *Enterprise Association of Steamfitters, etc.* v. *NLRB,* 521 F.2d 885 (D.C. Cir., 1975) (S.Ct. Docket No. 75-777, October Term, 1975). Briefly, that case involves a strike by employees of a pluming subcontractor against their employer, precipitated by the installation of pre-fabricated plumbing parts called for in the contract between the general contractor and the owner of the building under construction. The case turns on the question of whether, notwithstanding that prefabricated plumbing eliminates job-site work traditionally done by plumbers, the lack of control of the sub-contractor with respect to the specifications agreed to by the general contractor, *per se,* makes the (otherwise legal) strike illegal.

The facts of the present case satisfy *all* of the objections of the Board to the Circuit Court decision in *Enterprise.*[12] They incidentally evince a primary ILA objective and impugn the views below of ILA's employers as "neutrals".[13] In passing, the Board there acknowledged that

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[12] Solicitor General's Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Docket No. 75-777, filed December 1, 1975, at pp. 11-14.

[13] Thus, interpolating the Petititon in *Enterprise,* fn. 12, *supra:* The NYSA carriers *have had and do have discretion* respecting the handling (i.e., stuffing and stripping) of their containers by longshoremen, rather than by off-pier consolidators; "the decision [was and] is *theirs* to make." The ILA "could accomplish its [work preservation] design by changing the decision of [the NYSA carriers] alone", which the Board in *Enterprise* termed "the critical difference". And the "course of action", of the ILA, unlike that of the plumbers in *Enterprise,* would "preserve and produce work" (i.e., handling of consolidated containers) for the NYSA carriers' longshore employees, which is related to the "traditional tasks" of the job-site longshoremen and which *were not* "tactically calculated to satisfy union objectives elsewhere."

National Woodwork condones the effects which successful union efforts would have upon third parties in situations other than that in *Enterprise,* e.g., upon the off-pier consolidators herein.[14]

If work preservation depends *not* upon the traditional work of the plumbers, but rather on the activities of the prefabricating manufacturers, then no activity restricting the use of prefabricated parts can be legal, *whether or not* the employer has a "right of control". Thus the issue in the case at bar is far more fundamental and pervasive than the limited issue this Court has already agreed to pass upon and is of far greater consequence.

This Court's rejection of the rationale of *Enterprise,* therefore, would not resolve the issue herein. On the other hand, affirmance of *Enterprise, a fortiori,* would present an additional reason not only for the issuance of a Writ but as well for reversal of the decision below on the merits.

Conclusion

WHEREFORE, for the reasons above-stated, Petitioner ILA respectfully submits that a Writ of Certiorari should be granted.

Respectfully submitted,

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[14] Petition, fn. 12, *supra,* at 12.

ADDENDUM

U. S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON

July 1, 1964

Mr. Alexander P. Chopin, Chairman
New York Shipping Association
80 Broad Street
New York, New York

Mr. Thomas W. Gleason, President
International Longshoremen's Association
17 Battery Place
New York, New York

Gentlemen:

I am transmitting with this letter the report and findings of the Department of Labor on manpower utilization, job security and other related issues which affect the longshore industry in the Port of New York. This report, together with the other materials which have been previously furnished to you by the Department, should provide a firm factual base upon which constructive collective bargaining can proceed.

The problems associated with manpower utilization in an industry as complex as longshoring are never easy to resolve. An essential ingredient to their resolution, however, is an understanding by the parties of the nature of the problems and their relation to effective manpower utilization, the security of the workforce, and the economic well-being of the industry. In the study the Department, therefore, has attempted to develop information which identifies these problems in the hope that a common understanding of them will assist in their resolution.

While the longshore industry and its manpower utilization-job security problems are quite complex, they are by no means unique. In this age of changing technology, and increased competitive pressures both at home and abroad, a number of industries have been faced with—and have developed solutions—to similar problems. Although the specific solutions adopted may not have direct application to the longshore industry, the equitable principles underlying these various approaches warrant your serious study and thorough consideration. Briefly, these principles are that while management must be permitted to introduce new technology and economies and improve manpower utilization, there is an accompanying obligation upon the industry to assure a direct measure of job security for its workforce and to protect adequately any disadvantaged employees.

Without attempting to stress the obvious, I must impress upon you the importance of finding an answer to the problems which face your industry through the processes of normal collective bargaining. The longshore industry plays too vital a role in the industry and commerce of our Nation to risk any alternative route.

Yours sincerely,

W. Willard Wirtz
Secretary of Labor

Enclosure

Supreme Court, U. S.
FILED
JAN 6 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-570

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARAI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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REPLY OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

The Briefs in Opposition urge two grounds for opposing grant of Certiorari:

1. that the decision below raises no legal issues but merely involves factual application of well settled principles of law, and

2. that there is no conflict among the circuits because the decision below accords with the enforcement by the District of Columbia Circuit of another Board order, involving longshore contractual provisions on the West Coast on the handling of containers.

Neither of these contentions has merit in the light of the improper and erroneous distortion of this Court's decision in *National Woodwork*. Certiorari is clearly warranted to enable this Court to correct such errant departure from the standards enumerated by this Court, for the following reasons:

A. The Issue Here Is One of Law. The Alleged "Settled Principles" Applied Below Are Contrary To Those Enunciated By This Court in *National Woodwork*.

The Briefs in Opposition seek to minimize the legal issues presented by urging that all that was involved below was a factual determination amply supported by substantial evidence. Yet, these same Briefs admit that the Board's decision did not turn on a resolution of the facts since the findings of fact by the Administrative Law Judge, who upheld the rules as a valid work preservation clause, were not disturbed by the Board "and there is no factual dispute here" (NLRB Brief, p. 3 n. 2). Clearly, what is presented is a legal issue. That issue, which is found in every work preservation case, is the frame of reference of "the work in controversy".

Respondents contend that "in making its assessment the Board *properly concentrated* on the work done in the past at off-pier premises" (NLRB Brief, p. 10) (emphasis added). Inasmuch as this critical starting point was not a correct one, the analyses and conclusions of the Court, which adopted the Board's rationale, are inherently defective. The proper test as mandated by this Court, and followed by the dissent below, is that the focus must be on "the work done in the past by longshoremen" at the piers (A93). Thus, the issue is: what is the proper legal standard by which all work preservation clauses are judged.

To support the Board's position, respondents argue that *any* starting point is proper under the Court's "surround-

ing circumstances" test in *National Woodwork*, 386 U.S. 612 at 644, n. 38. They overlook the instruction of this Court thereat, that in evaluating the objective of the challenged contractual clause, it is necessary to consider, *inter alia*, the remoteness of the threat of displacement *by*—not *of*—the banned product or services. Here, the banned service is the off-pier loading and unloading of ocean cargo into containers supplied by the shipping companies. Those services would eliminate work that, prior to the advent of the innovation of containerization, historically was performed at the piers by the longshoremen. That is the work that the Rules seek to protect and preserve. Similarly, in *National Woodwork*, in testing the validity of the prohibition on the use of pre-cut doors, the Court did not, as the Board did here, divide the work into two different categories, *i.e.*, work on pre-cut doors, and work on non pre-cut doors. Rather, it focused on the work carpenters traditionally performed at the job site. When that was threatened by pre-cut doors, the bargaining unit had the right to protect its work from such displacement.

Moreover, the contention that the economic effect upon outsiders is part of the "surrounding circumstances" which the Board properly took into consideration (Brief of Consolidated, p. 12) would lead to a finding of a violation in every case since, by definition, enforcement of the clause in controversy always results in substantial economic effects on third parties. This contention was rejected by this Court in *National Woodwork* in stating that "however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective" (386 U.S. at 627).

We urge this Court to accept review to preserve both the basic legal principle of work preservation which has been distorted and effectively jettisoned by the decisions below, and the related "surrounding circumstances" test which has been misapplied below.

B. The District of Columbia Circuit Decision Relied Upon By Respondents, Involving Another Union With a Different Work History and Work Jurisdiction, Has No Application To The Instant Case.

The Briefs in Opposition glibly assert that the decision below maintains consistency in the Circuits, since it is in accord with the decision of the District of Columbia Circuit in *Pacific Maritime Ass'n* v. *Labor Board,* 515 F.2d 1018 (D.C. Cir. 1975), cert. denied, 424 U.S. 942 (1976) (hereinafter *"Cal Cartage"*). That court merely affirmed the Board's decision, 208 N.L.R.B. 994, without any opinion. The basis for the affirmance is not known and can only be conjectured.

It is astonishing that the Respondents find *Cal Cartage* of such significance since (1) it was neither cited nor relied upon by the Second Circuit and (2) the Board's opinion did not even refer to its own prior decision in *Cal Cartage* except for passing tangential reference (A73). Clearly, if that case presented the identical issue as is claimed by the Respondents, surely the Board and the court below would not have ignored it as they did. Only Judge Ordman came to grips with *Cal Cartage*. He found that it presented a completely different approach to containerization by the West Coast longshore union so that its precedential value on the East Coast was "substantially diluted" (A51).

As noted by Judge Ordman, the work history of the relevant longshore bargaining unit in *Cal Cartage* was significantly different than that present in the instant case. See *Ross:* Waterfront Response to Technological Change: A Tale of Two Unions, Labor L. J. July 1970, pp. 397-419 (A15, n. 3). There, the traditional work jurisdiction of the longshoremen at the piers, represented by the International Longshoremen's and Warehousemen's Union ("ILWU"), was limited. They *did not* have exclusive jurisdiction over all the work at the waterfront terminals

as did the ILA on the East Coast. In *Cal Cartage* both ILWU and non-ILWU employees had over the years worked side by side on the piers "preparing merchandise for loading aboard ship" (208 N.L.R.B. at 1003). Here, on the other hand there was a finding that:

> ". . . [*V*]*irtually all solid cargo* moving over the docks in the Port of New York *had for decades been handled on a piece-by-piece basis by longshoremen and employees in related crafts who worked on the docks and were represented by ILA.* Typically, that work included the preparation of cargo for shipment by the making up and loading of cargo on drafts, pallets and boxes for export, and the breaking down of such cargo from incoming ships for delivery to the consignees. *The existence of a tradition that ILA longshoremen and employees in related [ILA] crafts did such work is not essentially challenged.*" (A15) (emphasis added)

Furthermore, in *Cal Cartage* the Board's decision rested upon a clear and unequivocal contractual abandonment of container work by the ILWU in 1961 in exchange for a substantial, $22,000,000 fund. Only in 1970, after a ten-year hiatus, did it reassert a claim to that work. Here, on the other hand, the ILA had not abandoned its right to handle the cargo in consolidated containers at the piers. This was succinctly stated by Judge Ordman as follows:

> "*Certainly, unlike the situation in California Cartage, the instant proceedings do not present a situation where the Union bargained away certain rights in an agreement and, 10 years later, belatedly reasserted them.* In the instant cases ILA . . . never abandoned that jurisdiction." (A50-51) (emphasis added.)[1]

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[1] The Second Circuit agreed with Judge Ordman on this point stating that it was not "impressed" with the Board's abandonment theory (A92).

The Board's decision in *Cal Cartage* is not flawed by the error it committed here, i.e., looking at the work of the non-unit employees rather than the work of the unit employees; for the ILWU longshore unit did not historically have unfettered pier-side jurisdiction over all ocean cargo on the West Coast that ILA longshoremen have had in the Port of New York. That attempt by the ILWU in *Cal Cartage* to acquire such exclusive pier-side jurisdiction was thus completely different than the ILA's attempt here to preserve the jobs its members historically did perform. The Rules challenged here, similar to the prohibition in *National Woodwork,* merely prohibit those shipping companies subject to the ILA-NYSA contract from supplying containers to the employers outside the unit so as to prevent the further erosion of the work of the ILA longshoremen.

Conclusion

For the foregoing reasons it is respectfully submitted that the Briefs in Opposition avoid, rather than address, the arguments of the Petitions. The important and pervasive legal issue urged in the Petitions warrants the attention of this Court.

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